

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT M. CONNOR,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 196251

Oakland Circuit Court

LC No. 95-140884-FH

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (incapacitated victim). He was sentenced to four to fifteen years in prison. He appeals as of right. We affirm.

This case arises from an incident in which the victim consumed a large amount of alcohol, as well as Valium and Librium pills. The victim testified that after she passed out, defendant and another man carried the victim to her room. The victim awoke with defendant on top of her, penetrating her.

I

Defendant first argues that the evidence was insufficient to support his conviction of third-degree criminal sexual conduct. When reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a reasonable jury could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Third-degree criminal sexual conduct involves the sexual penetration of another person by force or coercion or penetration of a victim whom the actor knows to be physically helpless. *People v Hutner*, 209 Mich App 280, 283; 530 NW2d 174 (1995).

Defendant first contends that there was insufficient evidence of penetration. However, any entry, no matter how slight, will satisfy the element of penetration. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). MCL 750.520(a)(1); MSA 28.788(1)(1). We find that the victim's testimony was sufficient to establish the element of penetration.

Defendant also contends that the evidence was insufficient to prove the victim was physically helpless. We disagree. Physical helplessness includes both unconsciousness and being asleep. *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). The evidence of the victim's drug and alcohol, and subsequent loss of consciousness, is sufficient to establish physical helplessness of the victim. Viewed in the light most favorable to the prosecution, a reasonable jury could conclude that the elements of third-degree sexual conduct were proven beyond a reasonable doubt.

II

Next, defendant argues that the trial court improperly scored Offense Variable 2 (OV 2). Appellate review of scoring under the guidelines is very limited. *People v Randolph Warner*, 190 Mich App 26, 27; 475 NW2d 397 (1991). Indeed, a scoring error neither violates the law nor provides a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176; ___ NW2d ___ (1997). Only where the factual predicate for the score is wholly unsupported or materially false, and the sentence is disproportionate, will the application of the guidelines present a cognizable claim. *Id.* at 177.

Here, the sentencing judge scored twenty-five points for "bodily injury," which is not defined in the guidelines. Photographs of bruises on the complainant's arms were admitted into evidence and constituted sufficient evidence to support the score. Moreover, as explained below, defendant's sentence is not disproportionate. Therefore, defendant has not demonstrated that he is entitled to relief.

III

Finally, defendant contends that his sentence violates the principle of proportionality. We disagree. While a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), "the key test is whether the sentence is proportionate to the seriousness of the matter." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant's minimum sentence of four years falls within the range of 2½to 6 years recommended by the sentencing guidelines. Given the seriousness of the crime for which he was convicted, his lack of remorse, and the lack of any unusual circumstances, we find that defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Janet T.Neff

/s/ Myron H. Wahls

/s/ Clifford W. Taylor